

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

DONTE MCCLELLON,

Defendant.

CASE NO. 2:22-CR-00073-LK

ORDER ON REMAINING
MOTIONS IN LIMINE

This matter comes before the Court on Defendant Donte McClellon's Motion *in Limine* to Exclude Evidence of Other Alleged Crimes, Wrongs, or Acts - Rule 404(b), Dkt. No. 181,¹ and the Government's Consolidated Motions *in Limine*, Dkt. No. 182.² Mr. McClellon's motion is granted in part, denied in part, and deferred in part. The Government's motions are granted in part and deferred in part.

¹ The party moving in limine must certify that he conferred in good faith with opposing counsel in an effort to resolve the evidentiary dispute, and the certification "must list the date . . . [of] the conference." LCrR 12(b)(7). Mr. McClellon's certification does not specify the date of the parties' telephonic conference. *See* Dkt. No. 181 at 2.

² Because a party moving in limine may not file a reply brief unless requested by the Court, LCrR 23.1(6), the Court does not consider the Government's reply in support of its consolidated motions in limine, Dkt. No. 193, except for factual clarification as stated herein. The Court cautions both parties that it expects strict adherence to the Local Criminal Rules and Federal Rules of Criminal Procedure in the future.

I. BACKGROUND

The Government plans to try Mr. McClellon before a jury for three counts of Wire Fraud in violation of 18 U.S.C. § 1343 and two counts of Bank Fraud in violation of 18 U.S.C. § 1344(2). Dkt. No. 174 at 4–11. It alleges that, in May and June 2020, Mr. McClellon submitted documents to lenders containing materially false and misleading statements and information in support of several fraudulent applications for Paycheck Protection Program (“PPP”) loans. *Id.* at 2–11. Mr. McClellon purportedly obtained \$500,948 in PPP funds on behalf of three corporate entities he owned and controlled: Frostlake, LLC; Skylake, LLC; and Cannonlake, LLC. *Id.* at 3, 5. According to the Government, Mr. McClellon falsified financial and other tax documents related to these entities and misrepresented their monthly payroll expenses, number of paid employees, operational status, type of operations, and revenues. *Id.* at 5–6, 8–10; *see also* Dkt. No. 195 at 2 (table listing allegedly false employee numbers and monthly payroll claimed for three companies). The Government further claims that none of Mr. McClellon’s businesses had employees or payroll expenses. Dkt. No. 174 at 3. And, it contends, none of the businesses paid federal payroll taxes between at least January 2018 and December 2020. *Id.* at 3–4. Indeed, all three had been administratively dissolved as of May 2018. *Id.*; *see also* Dkt. No. 182 at 1 (“McClellon’s PPP applications and the forms he submitted with them were false—each of McClellon’s entities was a sham with no payroll, no employees, and no business operations.”).

The parties have moved in limine to exclude certain evidence from the jury. More specifically, Mr. McClellon wishes to keep the Government from introducing testimony and evidence about his “lavish lifestyle and spending habits” under Federal Rules of Evidence 403 and 404(b). Dkt. No. 181 at 1–3. As for the Government, it contends that any evidence of lender negligence and profits is irrelevant and should be prohibited under Rules 401 and 403. Dkt. No.

1 182 at 2. It also moves for a judicial finding, pursuant to 26 U.S.C. § 6103(i)(4), that Mr.
2 McClellon's tax returns are relevant. *Id.*

3 II. DISCUSSION

4 The Court first sets forth some general principles related to motions in limine. It then
5 addresses the parties' motions, beginning with Mr. McClellon's.

6 A. General Principles

7 Parties may move "to exclude anticipated prejudicial evidence before the evidence is
8 actually offered." *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984); *see United States v. Heller*,
9 551 F.3d 1108, 1111–12 (9th Cir. 2009) (the district court's ruling on a motion in limine "gives
10 counsel advance notice of the scope of certain evidence so that admissibility is settled before
11 attempted use of the evidence before the jury"). But a district court enjoys "wide discretion in
12 determining the admissibility of evidence," *United States v. Abel*, 469 U.S. 45, 54 (1984), and may
13 amend, renew, or reconsider its rulings in limine in response to developments at trial, *Luce*, 469
14 U.S. at 41–42; *see Ohler v. United States*, 529 U.S. 753, 758 n.3 (2000) (in limine rulings are not
15 binding on the district court because it may change its mind during trial).

16 Federal Rules of Evidence 401 and 403 generally guide the district court's analysis. *See*
17 *Houserman v. Comtech Telecomms. Corp.*, 519 F. Supp. 3d 863, 867 (W.D. Wash. 2021). The
18 district court must first consider whether the evidence at issue "has any tendency to make a fact
19 more or less probable than it would be without the evidence," and whether "the fact is of
20 consequence in determining the action." Fed. R. Evid. 401. If so, the evidence is relevant and
21 therefore generally admissible. *See* Fed. R. Evid. 402. But there are many exceptions to this general
22 rule. The district court may, for example, exclude relevant evidence if "its probative value is
23 substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the
24 jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

1 Relevance and prejudice “are determined in the context of the facts and arguments in a particular
2 case[.]” *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 387 (2008).

3 **B. Mr. McClellon’s Motion in Limine**

4 Mr. McClellon argues that “[e]vidence that [he] led an extravagant lifestyle and spent lots
5 of money on high-end products and experiences” is inadmissible under Rule 404(b). Dkt. No. 181
6 at 3 (“Mr. McClellon’s spending habits provide no evidence of knowledge, intent, motive, or
7 identity concerning the charges against him.”). The Government disagrees. It maintains that
8 evidence of how Mr. McClellon spent the PPP funds is not “other act” evidence under Rule
9 404(b)(1), but “direct evidence of his scheme to defraud PPP lenders.” Dkt. No. 195 at 7; *see also*
10 *id.* at 2 (arguing that Mr. McClellon’s use of the PPP funds for personal expenses rather than
11 business payrolls—the purpose of PPP loans—is “evidence of both his fraudulent scheme and his
12 intent to defraud”). And even if Mr. McClellon’s expenditure of the PPP funds is “other act”
13 evidence, the Government contends that such evidence is admissible under Rule 404(b)(2) because
14 it tends to prove his “scheme to defraud, intent to defraud, motive, [and] knowledge of falsity,”
15 and is not “remotely close to the category of barely relevant inflammatory evidence typically
16 subject to exclusion under Rule 403.” *Id.* at 2; *see also id.* at 10–11.

17 The parties appear to be talking past one another to some degree. There is a critical
18 distinction between (1) specific evidence of how Mr. McClellon spent the PPP funds at issue and
19 (2) general evidence of Mr. McClellon’s spending habits and purported “lavish lifestyle.” *See*
20 *United States v. Chalhoub*, 946 F.3d 897, 908 (6th Cir. 2020) (distinguishing between “wealth-
21 related evidence that passes muster under Rule 403” and “evidence that impermissibly appeals to
22 class prejudice”). The Government suggests that it intends to offer the former:

23 In each PPP loan application, McClellon certified he would use PPP funds for
24 employee payroll[.] . . . Instead, he spent the PPP funds on personal expenses, like
apartment rent, retail purchases, travel, personal training, and a gym membership.

1 This evidence is not offered because it is lavish or extravagant; it is offered because
2 it is demonstrably not payroll.

3 Dkt. No. 195 at 9; *see also id.* at 7 (“To obtain PPP funds, McClellon falsely claimed that he
4 needed the money for payroll and falsely claimed that he had 27 employees to support. But instead
5 of spending the PPP funds on payroll, he spent it on himself.”). Such evidence is highly probative
6 of whether Mr. McClellon knowingly devised a scheme or artifice to defraud (an element of wire
7 fraud), and whether he knowingly executed a scheme or artifice to obtain money owned by or
8 under the control of a financial institution by means of false or fraudulent pretenses or
9 representations (an element of bank fraud). *See* 18 U.S.C. §§ 1343, 1344(2); Ninth Circuit Model
10 Criminal Jury Instructions 15.35, 15.39 (Aug. 2023 Update). Indeed, in fraud prosecutions the
11 Government routinely presents evidence that a defendant did not use obtained funds for their
12 intended purpose. *United States v. Rude*, 88 F.3d 1538, 1549 n.10 (9th Cir. 1996) (approving the
13 Government’s use of a pie chart to depict how the defendant used fraudulently obtained funds);
14 *see also, e.g., United States v. Booth*, 309 F.3d 566, 575 (9th Cir. 2002) (that defendants received
15 money from clients “purportedly for securing leases” but “promptly spent the money on
16 themselves instead” was permissible circumstantial evidence of fraud); *United States v. Brutzman*,
17 731 F.2d 1449, 1452 (9th Cir. 1984) (defendant’s misuse of funds “directly established the
18 fraudulent nature of the scheme,” and its probative value was not outweighed by its potential
19 prejudicial effect), *overruled on other grounds by United States v. Charmley*, 764 F.2d 675, 677
20 n.1 (9th Cir. 1985).

21 And evidence of how Mr. McClellon spent the PPP funds is not subject to Rule 404(b).
22 There are two situations in which “other act” evidence is “inextricably intertwined” with the
23 alleged crime and therefore exempt from the requirements of Rule 404(b). *United States v.*
24 *Vizcarra-Martinez*, 66 F.3d 1006, 1012 (9th Cir. 1995). The first is when the evidence “constitutes

1 a part of the transaction that serves as the basis for the criminal charge.” *Id.* The second is when
2 the evidence is necessary to “a coherent and comprehensible story regarding the commission of
3 the crime[.]” *Id.* at 1012–13. Evidence that Mr. McClellon used the PPP funds for personal
4 expenses falls into both categories. To prove wire fraud and bank fraud, the Government must
5 show that Mr. McClellon lied about the purpose for which he was seeking PPP loans, i.e., that he
6 knowingly devised a scheme to defraud and knowingly executed a scheme to obtain money by
7 means of false representations. That Mr. McClellon did not spend the PPP funds on payroll tends
8 to show that he lied on his PPP loan applications to secure those funds. And it is difficult to
9 envision the Government trying its case without evidence of how Mr. McClellon spent the PPP
10 funds. As the Government notes, Mr. McClellon’s purported plan to spend PPP funds on personal
11 expenses unrelated to payroll “is *the essence* of his scheme to defraud.” Dkt. No. 195 at 9. Indeed,
12 a PPP loan recipient could only use the loan—and receive loan forgiveness—for certain business-
13 related costs and expenditures. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L.
14 No. 116-136, § 1106, 134 Stat. 297, 297–301 (2020) (codified as amended at 15 U.S.C. § 636m);
15 Keeping American Workers Paid and Employed Act, Pub. L. No. 116-136, §1102, 134 Stat. 281,
16 286–294 (codified as amended at 15 U.S.C. § 636(a)(36)). Evidence of Mr. McClellon’s
17 expenditures of the PPP funds is also relevant to prove his identity as the person who applied for
18 and received the PPP loans. *See* Dkt. No. 195 at 9–10; Dkt. No. 207-4 at 8–12.

19 But generalized evidence of Mr. McClellon’s “lavish lifestyle” and spending habits
20 unrelated to expenditure of the PPP funds at issue is significantly less probative of intent, motive,
21 and the alleged scheme to defraud, and carries a higher risk of unfair prejudice. *See S.E.C. v. Frost*,
22 No. 8:19-CV-01559-JLS-JDE, 2022 WL 17327322, at *6 (C.D. Cal. Feb. 23, 2022) (evidence of
23 a defendant’s wealth and lavish spending habits is irrelevant and inadmissible absent a sufficient
24 connection to the defendant’s participation in criminal activity); *United States v. Holmes*, No. 5:18-

1 CR-00258-EJD-1, 2021 WL 2044470, at *4 (N.D. Cal. May 22, 2021) (“[E]vidence of an
2 individual’s lavish spending habits, without a connection to an individual’s participation in
3 criminal activity, is irrelevant.”). Here, the Government can adequately show the jury that Mr.
4 McClellon did not use the PPP funds to maintain the payrolls of his dissolved businesses with less
5 inflammatory evidence—namely, evidence limited to his expenditure of the fraudulently obtained
6 PPP funds. *See Old Chief v. United States*, 519 U.S. 172, 184–85 (1997) (the probative value of
7 evidence may be calculated by comparing evidentiary alternatives); *United States v. McCandless*,
8 No. 4:22-CR-00032-DCN-1, 2023 WL 7701456, at *5 (D. Idaho Nov. 15, 2023) (distinguishing
9 between (1) generalized “lifestyle” evidence related to defendant’s wealth and spending of money
10 earned from sources other than the misappropriated construction loan and (2) evidence that
11 defendant spent the loan money designated for the construction project on unrelated personal
12 expenses; permitting the Government to present the latter category of evidence).

13 To the extent Mr. McClellon seeks an order excluding generalized “lavish lifestyle”
14 evidence, his motion is granted in part and deferred in part. The Court reserves the right to revisit
15 this issue on an item-by-item basis at trial, where it can weigh the probative value of what is being
16 offered against the risk of presenting unduly prejudicial evidence. Mr. McClellon’s motion is
17 denied to the extent that he wishes to preclude the Government from offering evidence specific to
18 his expenditure of the PPP funds at issue. Whether Mr. McClellon used the PPP loan funds for
19 personal expenditures rather than payroll is a “question[] at the heart of this case.” *McCandless*,
20 2023 WL 7701456, at *5. Thus, while “presenting an itemized list of the particular items [Mr.
21 McClellon] is alleged to have purchased may present a small risk of unfair prejudice, the Court
22 cannot say that risk substantially outweighs the probative value of the proposed evidence.” *Id.*; *see*
23 *also United States v. Hankey*, 203 F.3d 1160, 1172 (9th Cir. 2000) (Rule 403 “favors
24 admissibility,” and its application “must be cautious and sparing” because its “major function is

1 limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the
2 sake of its prejudicial effect” (quoting *United States v. Mills*, 704 F.2d 1553, 1560 (11th Cir.
3 1983))).

4 Mr. McClellon’s motion in limine is granted in part, denied in part, and deferred in part.

5 **C. The Government’s Motion in Limine**

6 The Court now turns to the Government’s motion to exclude evidence of lender negligence
7 and profits. After that, it addresses the Government’s request for a judicial finding that Mr.
8 McClellon’s tax returns are relevant.

9 1. Lender Negligence

10 The Government contends that “evidence of the victim-lenders’ negligence is irrelevant
11 under Rule 401 and unduly prejudicial under Rule 403 because victim negligence is neither a
12 defense to bank fraud or wire fraud nor material to the falsity of McClellon’s statements.” Dkt.
13 No. 182 at 5. Mr. McClellon objects to the Government’s request to exclude this information as
14 “overly broad” and argues that “[s]uch a ruling would preclude the defense from challenging the
15 materiality of [his] alleged fraudulent representations.” Dkt. No. 184 at 1 (“Materiality is an
16 essential element of the charges of both Bank Fraud and Wire Fraud.” (footnote omitted)); *see*
17 *Neder v. United States*, 527 U.S. 1, 20 (1999) (materiality is an element of a “scheme or artifice to
18 defraud” under the wire fraud and bank fraud statutes). According to Mr. McClellon, “[e]vidence
19 of *industry-wide* standards is relevant and admissible to determine the intrinsic capabilities of a
20 statement to influence a lender—that is, whether the statements at issue were material.” Dkt. No.
21 184 at 3 (emphasis added) (internal quotation marks omitted).

22 The parties are again talking past one another. They appear to agree that Mr. McClellon
23 may offer evidence on general industry practice and lending standards to disprove materiality, but
24 may not present evidence of an individual lender behavior, i.e., a specific lender’s purported

1 negligence or intentional disregard of information in approving a PPP loan. This comports with
2 Ninth Circuit authority. *See United States v. Lindsey*, 850 F.3d 1009, 1011–12, 1015–16 (9th Cir.
3 2017). The Court reserves the right to address this issue as it arises at trial.

4 2. Lender Profits

5 The Government similarly maintains that evidence of any profit by the lenders is
6 immaterial in a fraud case. Dkt. No. 182 at 9–10. In response, Mr. McClellon suggests that such
7 evidence is relevant to materiality because lenders “were financially incentivized to provide each
8 of the loans,” and “[t]he tendency of a particular misrepresentation to influence another person to
9 part with money . . . surely lies in tension with the financial incentive that person has to overlook
10 the misrepresentation.” Dkt. No. 184 at 6. Thus, Mr. McClellon argues, “[a] jury could certainly
11 find that the greater the financial benefit due a lender, the less motivated he or she naturally will
12 be to scrutinize a loan application for purported misrepresentations that would deny that benefit.”
13 *Id.* He accordingly urges the Court to permit evidence of lender “policies, procedures, and
14 representations designed to entice borrowers to use a particular service to apply for loans . . . in
15 light of the profits the lenders received in exchange for issuing the loans.” *Id.* at 7.

16 Here again, Mr. McClellon is free to offer evidence or elicit testimony about general
17 industry standards and practices bearing on materiality. He may not, however, offer evidence of
18 the behavior of individual lenders. This encompasses a specific lender’s motives (i.e., profits or
19 financial incentives) for approving loans, its intentional disregard of relevant information in
20 approving loans, and its policies, procedures, and representations designed to entice borrowers to
21 use a particular service to apply for loans. *Lindsey*, 850 F.3d at 1015–16; *see also United States v.*
22 *Kuzmenko*, 775 F. App’x 272, 274 (9th Cir. 2019) (the district court did not err in excluding expert
23 testimony aimed at the “complicity and motives of the particular victim lenders”); *United States*
24 *v. Powell*, 509 F. App’x 958, 967 (11th Cir. 2013) (whether lenders were motivated by profit or

1 did in fact profit from defendant's conduct was immaterial). The Court reserves the right to address
2 such evidence or argument at trial on an item-by-item basis.

3 3. Lender Wrongdoing as Impeachment Evidence

4 Mr. McClellon also opposes the Government's motion because "the defense must be
5 allowed to cross examine to show bias by a lender who is under [criminal] investigation and is
6 now testifying for the government," and one of the lenders under criminal investigation is
7 "Company One"—an alleged victim of the wire fraud charges. Dkt. No. 184 at 6. "Company One"
8 is financial technology company Kabbage. *Compare* Dkt. No. 174 at 4–7, *with* Dkt. No. 209 at 1,
9 *and* Dkt. No. 207 at 4. The Government indicates that the witness who will testify about Mr.
10 McClellon's PPP loan from Kabbage now works for American Express, and "[t]here is no
11 allegation that this witness is being investigated or himself committed any wrongdoing." Dkt. No.
12 193 at 3. Furthermore, Kabbage has filed for bankruptcy. *Id.* at 3–4.

13 As an initial matter, that the Government investigated a lender in connection with
14 facilitation of PPP loan fraud is evidence of specific lender behavior—evidence that *Lindsey*
15 proscribes as irrelevant and inadmissible. And the Court will not permit backdoor attempts to
16 shoehorn such evidence before the jury under the pretext of impeachment. Moreover, any tendency
17 that evidence might have to suggest bias on the part of the ex-employee is substantially outweighed
18 by a risk of confusing the issues and the jury. Fed. R. Evid. 403; *cf. United States v. Benchick*, No.
19 13-20453, 2015 WL 3464091, at *3 (E.D. Mich. June 1, 2015) (argument and evidence that lender
20 engaged in control fraud "would create a substantial danger of unfair prejudice, confusing the
21 issues, and misleading the jury"). The Court nonetheless defers its final ruling on this issue until
22 trial. The parties should, however, be prepared to discuss the issue at the pretrial conference.

1 4. Section 6103(i)(4)(A)(i) Relevance Finding for Tax Returns

2 The Government last requests a judicial finding that Mr. McClellon's 2019 and 2020 tax
3 returns are probative of an issue relevant to establishing the charged offenses. Dkt. No. 182 at 10.
4 Mr. McClellon does not oppose such a finding. *Id.* at n.3.

5 A tax return or taxpayer return information may be disclosed and used in a judicial
6 proceeding pertaining to enforcement of a federal criminal statute "if the court finds that such
7 return or taxpayer return information is probative of a matter in issue relevant in establishing the
8 commission of a crime or the guilt or liability of a party." 26 U.S.C. § 6103(i)(4)(A)(i). The Court
9 concludes that Mr. McClellon's 2019 and 2020 tax returns are relevant to establishing both the
10 wire fraud and bank fraud counts. In support of his PPP loan applications, Mr. McClellon
11 submitted 2019 and 2020 Schedule Cs that he allegedly filed with the IRS on behalf of Cannonlake,
12 Skylake, and Frostlake. Dkt. No. 182 at 10. As it turns out, however, there were apparently no
13 Schedule Cs attached to the Form 1040 that Mr. McClellon filed with the IRS in 2019. *Id.* And the
14 Government asserts that the 2019 Form 1040 is a two-page document in which Mr. McClellon
15 "claims no income and takes the standard deduction." *Id.* With respect to his 2020 tax returns, the
16 Government similarly contends that Mr. McClellon filed Schedule Cs with the IRS on behalf of
17 his three companies, but the documents "conflict with representations he made to banks about the
18 status of [those] entities." *Id.* at 10–11. The 2020 Schedule Cs filed with the IRS also purportedly
19 differ "significantly" from one that he filed in support of an unsuccessful PPP loan application. *Id.*
20 at 11. Thus, the Court agrees that Mr. McClellon's 2019 and 2020 tax returns are relevant to the
21 charged offenses because they could "show the falsity of [his] statements, his intent to defraud,
22 and his knowledge of the scheme and his false claims." *Id.*

23 The Government's motions in limine are granted in part and deferred in part.
24

Mr. McClellon's Motion *in Limine* to Exclude Evidence of Other Alleged Crimes, Wrongs, or Acts - Rule 404(b) is GRANTED IN PART, DENIED IN PART, and DEFERRED IN PART. Dkt. No. 181. The Government's Consolidated Motions *in Limine* are GRANTED IN PART and DEFERRED IN PART. Dkt. No. 182.


Lauren King
United States District Judge